BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-378-C - ORDER NO. 2002-2

JANUARY 9, 2002

IN RE: Southeastern Competitive Carriers Association, NewSouth Communications Corporation and TriVergent Communications,	)	ORDER GRANTING IN PART AND DENYING IN PART PETITION
Complainants/Petitioners,	)	
vs.	)	
BellSouth Telecommunications, Inc.,	)	
Respondent.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration and Clarification of Commission Order No. 2001-1036 filed on behalf of NewSouth Communications, TriVergent Communications, and the Southeastern Competitive Carriers Association (collectively, the Joint Petitioners).

First, the Joint Petitioners note that this Commission, in Order No. 2001-1036, imposed a prohibition on BellSouth from engaging in "Win Back" efforts until its former customers have been receiving service from a competitor for 10 calendar days. While the Joint Petitioners agree with the ruling in principle, they believe that the Order is subject to misinterpretation, and maintain that clarification would be helpful.

The Joint Petitioners note that a competitive local exchange carrier (CLEC) attempting to provide service to a BellSouth customer must first obtain a Letter of Agency (LOA) from the customer, and then submit the LOA to BellSouth's wholesale division along with a request for the Customer's Service Record (CSR). From the time that the LOA is submitted to BellSouth, the Joint Petitioners maintain that BellSouth's wholesale division has information which would be extremely valuable to its retail division in attempting to retain the customer. The Joint Petitioners further assert that, to be effective, the Commission's prohibition on Win Back activities by BellSouth must begin at the time that the LOA is submitted, and that Order No. 2001-1036 intended to impose such a prohibition. Some proposed language in clarification is then suggested.

We agree that clarification is appropriate, and grant said clarification, although we do not adopt the proposed language propounded by the Joint Petitioners. Instead, we hold that the prohibition on the sharing of information among BellSouth divisions found in Order No. 2001-1036 should begin at the time that BellSouth comes into possession of information from the CLEC which would suggest that a specific customer is considering a proposal from the CLEC. We believe that this appropriately clarifies the intent of our prior Order.

Next, the Joint Petitioners allege that Order No 2001-1036 fails to adequately address the issue of whether the Win Back offerings unreasonably discriminate between similarly situated customers. The pertinent statute provides that BellSouth should set rates "on a basis that does not unreasonably discriminate between similarly situated customers." See S.C. Code Ann. Section 58-9-576(B)(5)(Supp. 2001). We have

examined this question, and must conclude, based on the testimony, that the Win Back promotion does not unreasonably discriminate between similarly situated customers. We disagree with the Joint Petitioners belief that, according to the statute, the Order must explain why the two groups of customers are not "similarly situated" in order to arrive at the conclusion that the discrimination is reasonable. The statute does not say that. It only states that rates must be set on a basis that does not unreasonably discriminate between similarly situated customers. We take this to mean that if a Company can state a good reason for a pricing differential on a service between similarly situated customers, then the different rates are reasonable.

We believe that BellSouth has stated a good reason for the price differential between similarly situated customers. In this case, all of the customers involved are similarly situated as business customers. However, the group of business customers eligible for the promotion has left the BellSouth system, while the other business customers have not. The Joint Petitioners claim discrimination, since the business customers still on the BellSouth system are not eligible for the Win Back rate, which is lower. As noted in Order No. 2001-1036 at 6, BellSouth witness Robert H. Sellman, III testified that BellSouth introduced the Win Back Promotion as a direct response to competition in the business market in South Carolina. Sellman also stated that it often takes more to win back a customer that has established service with a different provider than it does to keep a customer who already has service with BellSouth. This mitigated against offering the promotion to BellSouth's existing customers. (See Sellman testimony, at TR. 93-158.)

Further, Cynthia Cox of BellSouth testified that the Win Back Promotion was a reasonable response to the actual competition that exists in South Carolina from rival companies. (See Cox testimony generally at Tr. 159-196.)

In summary, we think BellSouth has stated a good reason for the price differential between similarly situated customers. Again, most of this discussion was contained in our prior Order, along with citation to additional testimony that supports this holding.

Lastly, the Joint Petitioners allege that Order No. 2001-1036 conflicts with federal law in contravention of the Federal Telecommunications Act. The Joint Petitioners base their allegation on the notion that the non-discrimination obligation of S.C. Code Ann. Section 58-9-576 is the same non-discrimination obligation contained in Section 202 of the Federal Telecommunications Act. Section 202 makes it illegal for any common carrier to make any unjust or unreasonable discrimination in charges to any particular person or class of persons. 47 U.S.C.A. Section 202 (a). The Joint Petitioners allege error and state that this Commission did not address whether the Win Back Promotions involved reasonable discrimination. First, we do not necessarily believe that the Federal and State non-discrimination obligations are the same. However, even if we did, we hold that so-called "reasonable discrimination" exists with the Win Back Promotion under the Federal standard as well as the State standard.

The Joint Petitioners state that to determine whether a carrier is discriminating in violation of 47 U.S.C.A. Section 202(a), once must employ a three step inquiry: (1) whether the services are "like," (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable. *Competitive*

Telecommunications Association v. FCC, 998 F. 2d 1058, 1061 (D.C. Cir. 1993). Again, based on the testimony as cited above, and as is cited in Order No. 2001-1036, we believe that there is "reasonable discrimination" under the present scenario, when viewing it under the Federal standard. Frankly, we believe that there is little difference between this standard and the standard in the preceding paragraph concerning whether or not there is a good reason for a price differential between similarly situated customers. However, employing the standard as shown in the *Competitive Telecommunications Association* case, the services to the business customers involved are certainly "like," and there is a price difference between them. As we have held previously, that difference is reasonable under the circumstances of this case. Clearly, BellSouth has lost anywhere from 20% to nearly 25% of its market share in South Carolina and it is continuing to lose market share at a steadily increasing rate. See Sellman testimony. Further, BellSouth must be able to compete to win back customers lost to competition. Thus, the Win Back Promotion fulfills the criteria set out by the Federal case law.

Accordingly, the Petition of the Joint Petitioners is granted in part as described above, and the remainder of the Petition is denied as further described above.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)